

HUMAN RIGHTS TREATIES AND CAPITAL PUNISHMENT

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Eighty-nine States are today bound by international treaties that prohibit the death penalty. Most other States are bound by international treaties that limit or restrict the use of capital punishment. Only a handful of States are subject to no human rights treaty obligations concerning the use of capital punishment. It appears that most if not all States in this latter category consider that they are required to observe the main restrictions or limitations imposed by the treaties, even in the absence of treaty obligations as such.

Aside from the human rights treaties, various other international law conventions may govern the use of capital punishment. This is the case with the third and fourth Geneva Conventions, whereby the sentencing and execution of prisoners of war and of civilians in an occupied territory are restricted. In the field of international criminal law, the death penalty was permitted by the earliest instruments, in particular the London Agreement establishing the International Military Tribunal. It is now excluded by the Rome Statute of the International Criminal Court. Finally, many bilateral treaties in the area of extradition and mutual legal assistance contemplate the issue of capital punishment.

The core international human rights treaties of general application treat capital punishment as an exception to the protection of the right to life. The European Convention on Human Rights, adopted in 1950, affirms that '[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'. No limitations upon capital punishment are set out in the text. Subsequent instruments, in particular the International Covenant on Civil and Political Rights and the American Convention on Human Rights, adopt the same general principle although they employ a somewhat different formulation, associating capital punishment with several safeguards, restrictions and limitations. Each of these general human rights treaties has been subject to revision by means of additional protocols that prohibit the death penalty.

I. HUMAN RIGHTS TREATIES THAT PROHIBIT THE DEATH PENALTY

In the early 1970s, the Council of Europe began work on an additional protocol to the European Convention on Human Rights aimed at the abolition of capital punishment. Consensus on full abolition could not be achieved. The compromise reached in 1983, in Protocol No. 6 to the Convention, was a text proclaiming that

“[t]he death penalty shall be abolished, and that ‘[n]o one shall be condemned to such penalty or executed’. States Parties were however permitted to apply the death penalty ‘in respect of acts committed in time of war or of imminent threat of war’.”

Two decades later, Protocol No. 13 removed the wartime exception. Protocol No. 6 has been ratified by all Member States of the Council of Europe other than Russia. Protocol No. 13 has been ratified by all Member States with the exception of Armenia, which has signed, and Azerbaijan and Russia, which have not signed. Despite their failure to fully accept the treaty obligations, Armenia, Azerbaijan and Russia are all considered to be States that are abolitionist *de jure*. In the case of Armenia and Azerbaijan, this is a consequence of legislation, whereas Russia is prevented from imposing the death penalty by a judgment of its Constitutional Court.¹

The Second Optional Protocol to the International Covenant on Civil and Political Rights was adopted in 1989. Eighty-one States are parties to the Protocol and three others, Angola, Madagascar and Sao Tome and Principe, have signed the Second Optional Protocol but have yet to ratify it. In its report to the Human Rights Council, Angola noted the signature of the Second Optional Protocol saying it was “*in the process of ratification*”.² Several States Parties to the International Covenant on Civil and Political Rights have fully abolished the death penalty in law but have not signed or ratified the Second Optional Protocol. These States are Burundi, Cambodia, Côte d’Ivoire, Mauritius, Nauru, Palau, Samoa, Senegal, Togo and Vanuatu.

The Second Optional Protocol specifies that

“[n]o one within the jurisdiction of a State Party to the present Protocol shall be executed” and that “[e]ach State Party shall take all necessary measures to abolish the death penalty within its jurisdiction”.

Consequently, a State that has not fully abolished the death penalty may ratify or accede to the Second Optional Protocol provided that there is a moratorium in place and that it takes ‘all necessary measures’ in order to abolish capital punishment. Three States Parties to the Second Optional Protocol, Liberia, Benin and Mongolia, are not yet abolitionist in their

¹ See: National report, Russia, A/HRC/WG.6/16/RUS/1, §31.

² National report, A/HRC/WG.6/20/AGO/1, Angola, §27.

domestic law. Given their treaty obligations, it may be appropriate to speak of such States as being *de jure* and not merely *de facto* abolitionist in that they are henceforth bound by international law not to impose capital punishment.

Other States considered abolitionist *de facto* but not *de jure* have confirmed their intention to ratify or accede to the Second Optional Protocol. For example, Sierra Leone told the United Nations Human Rights Council that it accepted “*in principle*” recommendations that it ratify or accede to the Second Optional Protocol, “*subject to constitutional review*”.³ Somalia also accepted such recommendations, saying,

“[t]he Government will look into the matter regarding the second Optional Protocol to the ICCPR aiming at the abolition of the death penalty”.⁴



Suriname⁵ and Tajikistan⁶ also accepted similar recommendations. Given that there are approximately 50 States deemed abolitionist *de facto*, because they have not conducted an execution in at least a decade, it would seem possible to promote an increase in the number of States Parties to the Second Optional Protocol by convincing more such States to ratify.

Seven States that have abolished the death penalty, Bhutan, the Cook Islands, the Holy See, Kiribati, the Marshall Islands, Micronesia, and Niue are not parties to the International Covenant on Civil and Political Rights and as a result they cannot ratify or accede to the Second Optional Protocol. Some of these states have indicated that they cannot presently consider accession or ratification to the International Covenant because of resource constraints.⁷ Kiribati did not accept a recommendation from the Human Rights Council that it ratify the International Covenant, citing “*existing national capacity and resource constraints*”.⁸ Probably there would be more States Parties to the Second Optional Protocol were ratification possible by States that are not party to the Covenant itself. There is a good precedent for this in United Nations treaty practice: a State that is not party to the Convention on the Rights of the Child may nevertheless ratify the Optional Protocol on the sale of children, child prostitution and child pornography.

There are 13 States Parties to the Protocol to the American Convention on Human Rights to Abolish the Death Penalty. In 2012, Venezuela denounced

³ Report of the Working Group Sierra Leone, Addendum, A/HRC/18/10/Add.1.

⁴ The consideration by the Government of Somalia of the 155 recommendations, 21 September 2011, §96.68.

⁵ Report of the Working Group Suriname, Addendum, A/HRC/18/12/Add.1, §§73.32-73.38.

⁶ Report of the Working Group Tajikistan, Addendum, A/HRC/19/3/Add.1, §90.10.

⁷ Report of the Working Group, Bhutan, A/HRC/27/8/Add.1, para. 2.1; Kiribati responses to conclusions and/or recommendations, A/HRC/15/3/Add.1, para. 11; Report of the Working Group, Marshall Islands, A/HRC/16/12/Add.1, Addendum, §55.1.

⁸ Kiribati responses to conclusions and/or recommendations, A/HRC/15/3/Add.1, §11.

the American Convention on Human Rights. Although the Protocol may only be ratified or acceded to by a State Party to the American Convention, unlike the Convention itself the Protocol has no denunciation clause nor did Venezuela's denunciation purport to cover the Protocol. The American Convention on Human Rights specifies that a State that has abolished the death penalty may not reintroduce it. Thus, States that ratify or accede to the American Convention that are abolitionist at the time have, in effect, bound themselves to an international obligation comparable to those of the protocols. Bolivia, Dominican Republic, El Salvador, Haiti, and Peru are parties to the American Convention and have abolished the death penalty but they have not ratified or acceded to any of the abolitionist protocols.

The success of the abolitionist protocols provides an important manifestation of the general trend towards the elimination of capital punishment. For most States, ratification or accession is quite symbolic because of a commitment to abolition⁹ that is secured by legislation, consistent case law, constitutional provisions and a large consensus of public opinion. In some States, however, the legal consequence of adherence to one or other of the abolitionist treaties may be significant.

Ironically, the abolitionist protocols within the European human rights system have been cited by the European Court in order to retard the progressive interpretation of the European Convention itself. In *Soering v. the United Kingdom*, the plenary European Court of Human Rights explained that,

"Protocol No. 6, as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement".



Court added that,

"[i]n these conditions, notwithstanding the special character of the Convention, Article 3 [of the Convention] cannot be interpreted as generally prohibiting the death penalty".⁹



Grand Chamber adopted a similar approach with respect to Protocol No. 13 in *Öcalan v. Turkey*, noting that the States Parties had elected to follow *"the traditional method of amendment of the text of the Convention"* rather than leaving the issue to judicial innovation.¹⁰


⁹ ECHR, decision of 7 July 1989, *Soering v. the United Kingdom*, Application No. 14038/88, §91.

¹⁰ ECHR, decision of 12 May 2005, *Öcalan v. Turkey*, Application No. 46221/99, §164-165.

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The European Court of Human Rights has now moved to a position whereby it deems the reference to capital punishment in article 2 of the Convention to be no longer valid. In *Al Nashiri v. Poland*, the Court said the fact that

“imposition and use of the death penalty negates fundamental human rights has been recognised by the member States of the Council of Europe”.

 described judicial executions as *“the deliberate and premeditated destruction of a human being by the State authorities”*, adding that the extinction of human life involves physical pain regardless of the method of execution. Furthermore,

*“the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering”.*¹¹

In effect, then, with such a progressive interpretation of the Convention itself, Protocols No. 6 and 13 have little or no *raison d'être*. Moreover, it would be accurate to describe the European Convention, according to the interpretation now prevailing at the European Court of Human Rights, as an abolitionist treaty. It would certainly be impossible now for a new State to ratify the Convention without having abolished the death penalty.

Before concluding with the fully abolitionist treaties, mention should be made of the European Charter of Fundamental Rights. Reprising almost exactly a phrase from article 1 of Protocol No. 6 to the European Convention on Human Rights, article 2(2) of the Charter declares that

“[n]o one shall be condemned to the death penalty, or executed”.

II. HUMAN RIGHTS TREATIES THAT RESTRICT THE DEATH PENALTY

Not quite 40 States still continue to use the death penalty. In any given year, approximately 20 States actually conduct executions. These numbers continue to decline. It seems to be only a matter of time, perhaps a decade or two, before the death penalty disappears. Most of the States that practice capital punishment are parties to the International Covenant on Civil and Political Rights. They are bound by treaty to several limitations on capital punishment set out in article 6 of the Covenant. In particular, they may only impose the death penalty

“for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide”.

¹¹ ECHR, decision of 24 July 2014, *Al Nashiri v. Poland*, Application No. 28761/11, §577.

Capital punishment ‘can only be carried out pursuant to a final judgment rendered by a competent court’. A person sentenced to death has the right ‘to seek pardon or commutation of the sentence’. Furthermore,

“[a]mnesty, pardon or commutation of the sentence of death may be granted in all cases”.



death penalty may not be imposed upon persons below the age of 18 at the time of the offence and on pregnant women.

The minimum standards on the death penalty set out in article 6 of the Covenant have been interpreted and to some degree amplified in resolutions of the Economic and Social Council, notably the Safeguards guaranteeing protection of those facing the death penalty and in the case law of the Human Rights Committee. In recent years, the Committee has issued Views on the prohibition of a mandatory death penalty,¹² the requirement that procedural fairness be scrupulously observed,¹³ risk of capital punishment in the event of extradition, expulsion or deportation¹⁴ and conditions on death row.¹⁵ On two occasions, it also issued press releases expressing grave concern at the imposition of death sentences in Belarus despite the issuance of a request that execution be stayed pending consideration of the case by the Human Rights Committee. The Committee described such actions as “*flagrant violations of the human rights treaty obligations of Belarus*”.¹⁶ The Human Rights Committee has also addressed issues relating to the death penalty in its consideration of periodic reports.

Of the States that continue to practise capital punishment, nine have not ratified the International Covenant on Civil and Political Rights: China, Malaysia, Oman, Saint Kitts and Nevis, Saudi Arabia, Singapore, South Sudan, Taiwan and the United Arab Emirates. Both China and Taiwan (as the Republic of China) have signed the Covenant. Many of the States in this category have indicated in their reports to the Human Rights Council that they comply with most if not all of the standards set out in article 6 of the

¹² CCPR, decision of 14 May 2005, *Weerawansa v. Sri Lanka*, Application No. 1406/2005; CCPR, 2006 *Mwamba v. Zambia*, Application No. 1520/2006; CCPR, decision of 23 March 2012, *Kamoyo v. Zambia*; CCPR, decision of 27 March 2014, *Johnson v. Ghana*, Application No. 2177/2012.

¹³ CCPR, decision of 10 March 2010, *Mwamba v. Zambia*, Application No. 1520/2006; CCPR, decision of 25 March 2011, *Otabek Akhadov v. Kyrgyzstan*, Application No. 1503/2006; CCPR, decision of 29 March 2011, *Andrei Khoroshenko v. Russia*, Application No. 1304/2004; CCPR, decision of 29 October 2012, *Lyubov Kovaleva and Tatyana Kozyar v. Belarus*, Application No. 2120/2011; CCPR, decision of 23 March 2012, *Svetlana Zhuk v. William Kamoyo v. Zambia*, Application No. 1859/2009; CCPR, decision of 30 October 2013, *Belarus*, Application No. 1910/2009.

¹⁴ CCPR, decision of 1 November 2011, *X. v. Sweden*, Application No. 1833/2008.

¹⁵ CCPR, decision of 23 March 2012, *William Kamoyo v. Zambia*, Application No. 1859/2009; CCPR, decision of 10 March 2010, *Mwamba v. Zambia*, Application No. 1520/2006.

¹⁶ Report of the Human Rights Committee, A/66/40 (Vol. I), §§50-51; Report of the Human Rights Committee, A/67/40 (Vol. I), §§55-57.

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Covenant.¹⁷ Malaysia even told the Council that it applies safeguards *that “are in line with international standards, in particular Article 6 of ICCPR”*.¹⁸ Saudi Arabia and the United Arab Emirates have ratified the Arab Charter of Human Rights. The Arab Charter contains a provision on capital punishment that is adapted from article 6 of the Covenant although it does not adequately prohibit exhibition for offences committed by persons under the age of 18.

CONCLUDING REMARKS

Although the abolitionist protocols are becoming increasingly redundant in light of the progressive interpretation of the right to life provisions of the main human rights treaties, they may nevertheless be of considerable legal importance in States that have not fully abolished capital punishment in their domestic law. More attention might usefully be devoted to persuading States that are still only abolitionist *de facto* to ratify or accede to the instruments.

The number of States that applies capital punishment continues to decline. Although not all of these States have accepted the international treaties containing limitations or restrictions on the death penalty, they seem willing to acknowledge that these are international standards that must be followed even in the absence of a convention obligation. In other words, the norms set out in article 6 of the International Covenant on Civil and Political Rights must also constitute customary international law.

¹⁷ China, National Report, A/HRC/WG.6/4/CHN/1, §§43-44; Malaysia, National Report, A/HRC/WG.6/17/MYS/1, §45; Oman, National Report, A/HRC/WG.6/10/OMN/1, §§76-78; Saint Kitts and Nevis, Working Group Report, A/HRC/17/12, §§9-13; Saudi Arabia, National Report, A/HRC/WG.6/17/SAU/1, §35; Saudi Arabia, Working Group Report, A/HRC/25/3, §97; Singapore, National Report, A/HRC/WG.6/11/SGP/1, §§113-120.

¹⁸ Malaysia, National Report, A/HRC/WG.6/17/MYS/1, §45.

